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No. 90-1501

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In the Supreme Court of the United States

OCTOBER TERM, 1990

OLIVER L. NORTH, CROSS-PETITIONER

v.

UNITED STATES OF AMERICA, CROSS-RESPONDENT

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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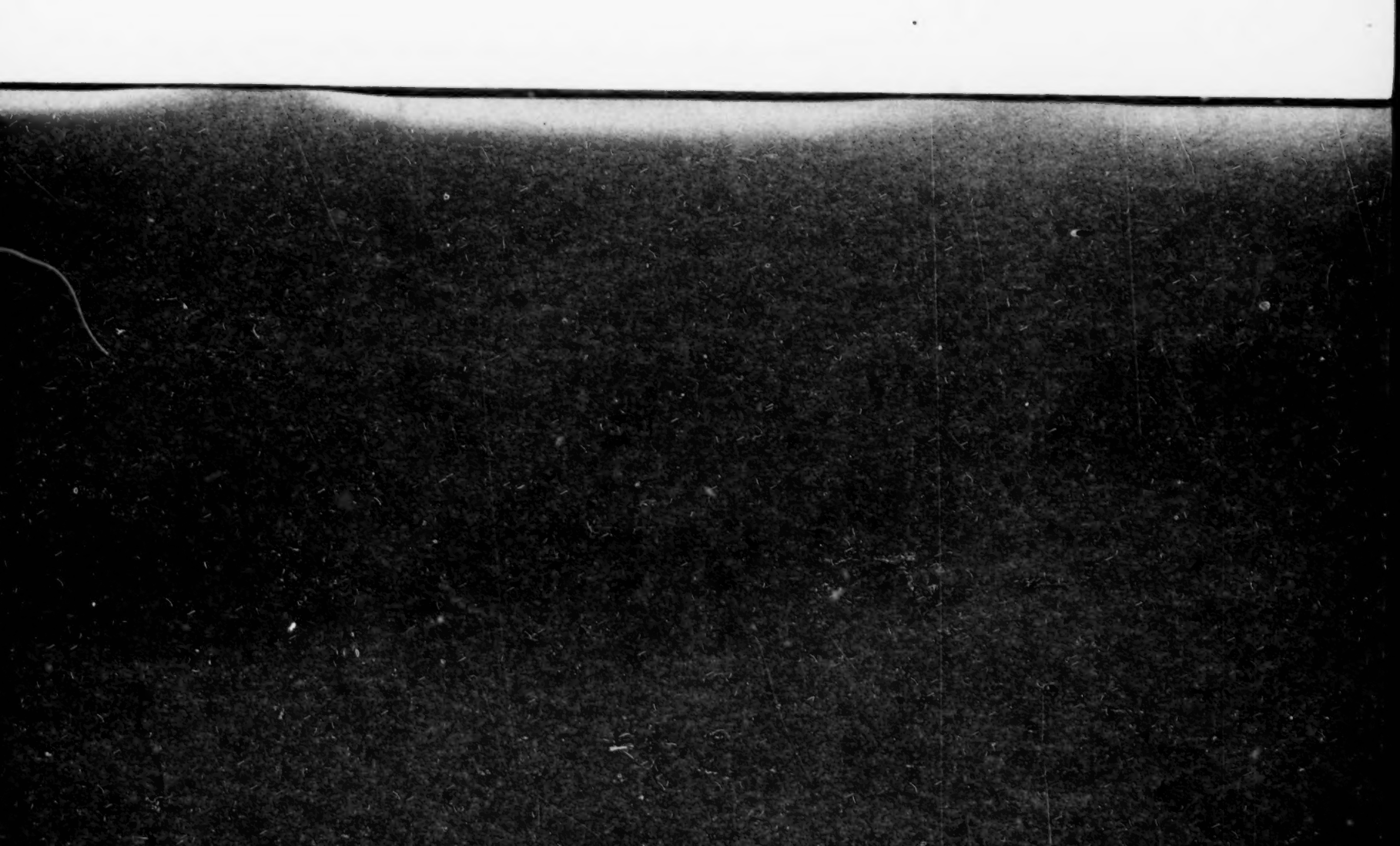
CROSS-RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether failure to submit an element of the offense to the jury may be harmless error when other findings by the jury make clear that it believed the omitted element to have been proved.

2. Whether knowledge of unlawfulness is an element of the offense under 18 U.S.C. 1505.

3. Whether the discovery procedures in this case denied the defendant due process.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

CROSS-RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT

The procedural history of this case is set out in our petition for a writ of certiorari in *United States* v. *North*, No. 90-1337, which describes the decisions of the courts below on cross-petitioner North's successful Fifth Amendment challenge to his convictions on three counts. North also unsuccessfully advanced a number of other claims; some of those challenges are the subject of his cross-petition. The background relevant to those contentions is set out below.

1. Count 6 of the indictment charged North with aiding and abetting the obstruction of congressional inquiries into the sale of arms to Iran and the provision of assistance to Nicaraguan rebels known as "Contras," in violation of 18 U.S.C. 1505 and 2. That statute proscribes "corrupt" acts or endeavors to influence, obstruct, or impede "the due and proper exercise of the power of inquiry under which any inquiry or investigation is being

had" by Congress. In particular, the indictment alleged that North participated in the preparation of a false and misleading chronology of events concerning the shipment of arms to Iran, for use in briefing members of Congress. The indictment also alleged that North altered, destroyed, concealed, and removed National Security Council documents as part of an endeavor to obstruct congressional inquiries. JA 251-253.[1]

At the close of evidence, the parties agreed that the offense stated in Section 1505 has four elements: that a congressional inquiry was pending; that the defendant was aware of the inquiry; that the defendant endeavored to obstruct the inquiry; and that the defendant did so with the requisite corrupt intent. See Pet. App. 84a. The district court, however, found " 'as a matter of law that congressional inquiries were pending' " *(id.* at 84a, quoting JA 635), and it accordingly instructed the jury to deliberate only as to the other three elements of the offense. JA 635-636. As for the mental element, the court instructed the jury that it could convict only upon finding that North acted with specific intent, which the court defined as requiring "that a person not only acted knowingly, voluntarily and deliberately, but that he acted with a bad purpose, having decided in his mind what he would do, and that he then did something prohibited." *Id.* at 673. The court added that "the obstruction counts involved not only this element of specific intent but the defendant must have acted corruptly. In the obstruction counts a deliberate, knowing bad purpose is not enough to convict. [The defendant] must be shown beyond a reasonable doubt to have had the bad purpose to act in the precise manner the statute was intended to prevent."

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[1] "JA" refers to the joint appendix in the court of appeals; "Pet. App." refers to the appendix to our petition for a writ of certiorari, No. 90-1337; "Cross-Pet. App." refers to the appendix to the cross-petition.

JA 574; see *id.* at 574-575.[2] North was convicted, and the district court declined to set aside the verdict. See Pet. App. 307a-308a.

The court of appeals found that the district court erred in not submitting the first element of the Section 1505 offense to the jury. Pet. App. 84a. But, citing this Court's decision and Justice Scalia's concurrence in *Carella* v. *California*, 491 U.S. 263 (1989), the court of appeals held that such an error is "subject to harmless error analysis when no rational jury could find the other elements of the offense without finding the fact presumed." Pet. App. 85a. And on its review of the record, the court held the error here harmless beyond a reasonable doubt. The court found it "clear from North's own trial testimony * * * not only that congressional inquiries were in fact pending in November 1986, but also that he himself realized that they were pending at that time." *Id.* at 86a. With this in mind, the court concluded that "no rational jury could find that North knew of the pending congressional investigation, endeavored to obstruct it, and did so with specific corrupt intent without concomitantly finding that the investigation was pending in the first place." *Id.* at 87a (footnote omitted).[3]

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[2] The district court declined to instruct the jury on an "authorization defense," which would have required it to return a verdict of not guilty upon finding that North had reasonably relied on the authority of his superiors. See Pet. App. 56a. Instead, the court instructed the jury to disregard evidence of authorization in determining whether North acted with specific intent unless "'the defendant was specifically ordered and directed by a superior to act contrary to the law, and if no alternative was available to him to comply with the order by other lawful means . . . [and if] he reasonably believed the order was legally proper.'" *Ibid.*, quoting JA 674-675.

[3] Judge Silberman dissented on this point. Pet. App. 208a-217a. In his view, "under relevant Supreme Court decisions reversal is automatically required when the judge, as here, directs a verdict on an essential element of that crime, no matter how overwhelming—or even uncontested—the evidence is on that issue." *Id.* at 209a. He distinguished *Carella* as addressing only "the error of shifting

The court of appeals also held that the district judge did not err in his charge relating to the mental element of the Section 1505 offense. Pet. App. 61a-68a. The court explained that, "[a]lthough the violation of this statute is a 'specific intent' offense, 'the mental state required for most "specific intent" offenses does not involve knowledge of illegality.'" *Id.* at 67a (citation omitted). It followed that, "because knowledge of illegality was not required, [North] was not entitled to an instruction that the jury should consider authorization as bearing on knowledge of illegality." *Ibid.* The court added that "'corruptly' and the other words in the statute are to be understood according to their common meanings, necessitating no specific definitional instructions from the court." *Id.* at 68a. See *id.* at 62a-63a. The court therefore concluded that, "[i]f the jury was convinced beyond a reasonable doubt that North's creation of a false chronology was an intentional (as defined in the instructions) endeavor corruptly to influence the congressional investigation (as defined in the common use and sense of those terms), then it was the jury's duty to return a verdict of guilty." *Id.* at 68a.[4]

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the burden of proof." *Id.* at 212a. See *id.* at 213a. He also was of the view that other circuits have "refus[ed] to apply harmless error analysis when trial judges direct a verdict in favor of the government on any essential element of a crime." *Id.* at 213a-214a. Finally, he concluded that the error here was not harmless. *Id.* at 215a-217a.

[4] Judge Silberman again dissented. Pet. App. 174a-191a. Like the majority, he "decline[d] to hold here that section 1505 requires knowledge of unlawfulness." *Id.* at 178a-179a. He also "tend[ed] to agree with the Majority's statement * * * that North was 'entitled only . . . to a jury that applied "corruptly" according to its usual definitions.'" *Id.* at 183a. But he found that the jury was not instructed to do that here (see *ibid.*), reasoning that Section 1505 "requires the prosecution to prove that the endeavor * * * was depraved, evil, or wrongful." *Id.* at 184a. And he concluded that in making this determination, the jury "must be permitted to consider, at the very least, evidence tending to show that the defendant believed that the nature of his conduct (as opposed to its under-

2. a. Much of the pretrial wrangling in this case involved application of the Classified Information Procedures Act ("CIPA"), 18 U.S.C. App. IV, which comes into play when a criminal case may involve the disclosure of classified information. Under Section 5(a) of CIPA, the defense must (on pain of the exclusion of its evidence, see Section 5(b)) provide "a brief description" to the prosecution, prior to trial, of all the classified information that it "reasonably expects to disclose or to cause the disclosure of." The government then may seek a hearing under Section 6(a) to determine the "use, relevance, and admissibility" of the defense's classified information; Section 6(b) obligates the government, prior to this hearing, to notify the defense of the items whose disclosure it will contest. If the court determines that the classified information propounded by the defense is admissible, Section 6(c) allows the government to substitute an admission, or a summary of the classified data, so long as that "will provide the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information." Finally, if the district court determines that classified information may be disclosed at trial, Section 6(f) provides that "the court shall, unless the interests of fairness do not so require, order the United States to provide the defendant with the information it expects to use to rebut the classified information."

b. In this case, the district judge announced in his first CIPA order that his goal was "to make the defendant whole." Cross-Pet. App. 7a-8a. To this end, at the outset the judge issued a broad discovery order to the government that ultimately required it to disclose some 900,000 pages of documents. Pet. App. 98a n.36. The

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lying justification) was appropriate—that is, in accordance with the law." *Id.* at 187a. He therefore found that "a fair reading of section 1505 sustains North's objections to strictures placed on the jury's consideration of the evidence of authorization in the record." *Id.* at 179a.

judge then directed North to file his CIPA Section 5 notice by July 11, 1988 (later delayed to August 1, 1988). Cross-Pet. App. 10; Pet. App. 98a-99a. When the defense filed this document, however, the district court rejected it "as 'wholly insufficient' because it lacked 'necessary particularization' as to the relevance and materiality of the documents noticed." Pet. App. 99a. The district judge later observed that he had "tested North's notice against some of the documents noticed and concluded that the filing was obviously submitted in bad faith." *United States* v. *North* (*North I*), 708 F. Supp. 389, 393 (D.D.C. 1988).[5] The court nevertheless invited the filing of a second CIPA notice by November 14, 1988, without prejudice to the defense. *Ibid.*

The court subsequently found North's second CIPA notice equally unacceptable, explaining that it "reflected a deliberate disregard of the Court's Order. It seeks disclosure of masses of classified material which under no conceivable version of a defense could have any utility whatsoever." *North I*, 708 F. Supp. at 395. The court contrasted this with the discovery offered by the government, which provided North "the documents [it] intended to introduce at trial in the case-in-chief," "turned over thousands of other documents developed during Independent Counsel's inquiry," and advised North "of the witnesses Independent Counsel intended to call at the trial." *Id.* at 391. In all, the court observed that the government's disclosures placed North "in a unique position not required by CIPA and perhaps never so generously awarded any federal criminal defendant faced with a need to use classified documents at trial." *Ibid.* The court accordingly concluded that North's "counsel's tactical disregard of the Court's orders" (*id.* at 398) justified preclusion, pursuant to CIPA Section 5(b), of North's use of certain classified material at trial. *Id.* at 395-399. So as not to unduly prejudice the defense, however,

[5] This order does not appear in the appendix to the cross-petition.

the court permitted North to identify up to 300 classified documents—approximately the number designated by the government for use in its case-in-chief—for use at trial, directing him to specify the relevance and materiality of these items. *Id.* at 398-399.

In response to this order (and to another issued on November 23, 1988 (see JA 418)), North designated documents and submitted a "narrative statement" (Cross-Pet. App. 14a-15a) that the district court determined to provide to the government. While noting that the statement contained some useful information, the court observed that the statement did not indicate which individuals would be called as witnesses, did not develop in detail how facts would be proved, and did not tie information to any particular count. *Id.* at 15a. Again pointing to the extensive disclosures made by the government, the court concluded that it could not "accede to North's view of due process that one is entitled to get everything and disclose nothing." *Id.* at 17a.

After reviewing the narrative statement, the district court observed that it "weaves together classified information relating to hundreds of topics or incidents, often in a rather disjointed fashion," and "does not tie this classified information to particular counts." *United States* v. *North* (*North II*), 713 F. Supp. 1436, 1437 (D.D.C. 1989).[6] As for the classified materials designated by North, the court noted that it "has in most cases been unable to determine why North believes a particular document is relevant and material to the remaining counts" (*id.* at 1437-1438); the government declared itself equally befuddled by North's filing. See *id.* at 1438. At the same time, the court stated that North and his counsel "have remained, in spite of the Court's urging, unwilling to advise the government, except occasionally in the most generalized terms, why they believe that a particular document or portion of a document is relevant, material and

[6] This order is not included in the appendix to the cross-petition.

required in defending the case." *Ibid.* So as to avoid "legal gridlock," the court accordingly set out categories of classified information that the defense could use at trial. See *id.* at 1438-1439. The court did not respond to North's motion under CIPA Section 6(f) for disclosure of material that the government would use in rebutting his classified information. See Pet. App. 101a. After trial, however, the court denied North's motion to hold CIPA unconstitutional as applied, finding it "absolutely clear that CIPA, as applied under scores of rulings by the Court, has not denied defendant North his right to a fair trial." JA 512.

c. The court of appeals held that the district judge erred in failing to rule on North's Section 6(f) motion. Pet. App. 102a. The court held the error harmless, however, explaining that North "has adduced no evidence of prejudice resulting from the District Court's error. Despite the benefit of a full trial record, North fails to demonstrate how he was surprised or prejudiced by prior unawareness of any of the evidence presented by the [Independent Counsel] at trial to 'refute' his defenses." Pet. App. 103a. The court also noted that the district judge in several instances provided North with "more procedural safeguards than CIPA requires." *Ibid.* And it found that, "[i]n sum, the District Court's implementation of CIPA ultimately required each side to reveal substantial aspects of its arguments to its opponents. This result was envisioned by Congress, * * * and is consistent with the 'salutary' development of 'a system of liberal discovery which gives both parties the maximum possible amount of information with which to prepare their cases and thereby reduces the possibility of surprise at trial.'" *Id.* at 105a (citation omitted), quoting *Wardius* v. *Oregon*, 412 U.S. 470, 473-474 (1973).[7]

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[7] Judge Silberman again dissented. Pet. App. 169a-174a. He reasoned that the "disclosure provisions of CIPA would be unconstitutional if the reciprocity section were not part of the Act. Therefore, if the district judge 'amends the statute' by simply refusing to enforce that portion he renders it unconstitutional." *Id.* at 170a-

DISCUSSION

A. The District Court's Failure To Instruct The Jury On An Element Of The Section 1505 Offense Was Reviewable Under A Harmless Error Standard And Was Harmless Beyond A Reasonable Doubt

North first contends (Cross-Pet. 7-13) that the district court's failure to submit an element of the Section 1505 offense to the jury was not susceptible to harmless error analysis. As the court of appeals explained, however, the conduct of a harmless error inquiry in this case was wholly consistent with this Court's decisions. And no court of appeals has embraced a contrary rule in circumstances such as those present here. Review on the merits accordingly is not warranted.

1. In recent years, this Court has held that mandatory, conclusive presumptions requiring the jury to find that particular elements of the offense have been established, although violative of constitutional rights to jury trial or due process, may nevertheless be subject to harmless error analysis. *Carella* v. *California*, 491 U.S. 263 (1989). See also *Rose* v. *Clark*, 478 U.S. 570 (1986) (rebuttable presumption subject to harmless error analysis). The Court also has held that instructions misdescribing elements of the offense may be found harmless. *Pope* v. *Illinois*, 481 U.S. 497 (1987).

Justices have, of course, expressed differing views on the nature of the harmless error inquiry in such circumstances (see *Carella*, 491 U.S. at 270-271 (Scalia, J. concurring in the judgment))—an issue that is now pending before the Court in *Yates* v. *Evatt*, No. 89-7691 (argued Jan. 8, 1991). But there has been agreement

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171a. With this in mind, Judge Silberman concluded that the district judge's failure to grant North's Section 6(f) motion was reversible error unless harmless beyond a reasonable doubt. *Id.* at 162a. He found that the error was not harmless under that standard. *Id.* at 172a-174a.

that, at a minimum, such errors may be held harmless when there is reason to believe, not only that a properly instructed jury *would have* found all the elements of the offense to be present, but that the defendant's jury *in fact* found all of those elements to have been established. That will be the case when the jury's findings on related issues make clear that it must have believed the omitted element to have been proved. See *Carella*, 491 U.S. at 266; *id.* at 270-271 (Scalia, J., concurring). For similar reasons, harmless error inquiry is appropriate when it appears that the "error did not play any role in the jury's verdict" (*Connecticut* v. *Johnson*, 460 U.S. 73, 87 (1983) (plurality opinion)), as where a misinstruction involved "an element of the crime that the defendant in any case admitted." *Carella*, 491 U.S. at 270 (Scalia, J., concurring in the judgment).

North thus is incorrect in asserting (Cross-Pet. 10) that the Court has drawn a distinction between instructions "that shift the burden of proof," which he acknowledges are subject to harmless error analysis, and those "that preclude the jury from considering an element of the offense," which he contends are not. After all, mandatory presumptions (and erroneous instructions that fail to require findings as to particular elements of the offense) do more than shift the burden of proof; they "directly foreclose[] independent jury consideration of whether the facts proved established certain elements of the offense[]." *Carella*, 491 U.S. at 266. Instead, the line drawn by the Court separates cases where the jury made *no* findings that relate to the omitted element from those where "other facts necessarily found by the jury are so closely related" to the omitted element that "those findings [are] * * * functionally equivalent to finding the element required to be presumed." *Id.* at 271 (Scalia, J., concurring in the judgment).

In the latter category of cases, a harmless error inquiry is not equivalent to "'entering a judgment of con-

viction or directing the jury to come forward with such a verdict.'" *Arizona* v. *Fulminante*, 111 S. Ct. 1246, 1256 (1991) (White, J., dissenting), quoting *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 572-573 (1977). To the contrary, the inquiry in such a case concerns the significance of the jury's verdict, a determination that may be made without difficulty on the existing record. *Rose*, 478 U.S. at 579 n.7. Similarly, when the defendant acknowledges the existence of an element of the offense, "'the reviewing court can be confident that [the] error did not play any role in the jury's verdict.'" *Carella*, 491 U.S. at 270 (Scalia, J., concurring in the judgment), quoting *Johnson*, 460 U.S. at 87 (plurality opinion).

That is precisely the analysis used by the court below in holding the district court's error harmless. The court of appeals reviewed the record and found it "clear from North's trial testimony * * * not only that congressional inquiries were in fact pending in November 1986, but also that he himself realized that they were pending at that time." Pet. App. 86a. And citing Justice Scalia's concurrence in *Carella*, the court determined that, "in light of North's own testimony, no rational jury could find that North knew of the pending congressional investigation, endeavored to obstruct it, and did so with specific corrupt intent without concomitantly finding that the investigation was pending in the first place." *Id.* at 87a (footnote omitted). These fact-specific determinations plainly were correct;[8] they do not, in any event, warrant this Court's consideration.

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[8] North devotes two footnotes in his petition to an attack on the factual premises of the court of appeals' decision. Pet. 8-9 n.7, 11-12 n.10. He evidently means to challenge (see Pet. 11-12 n.10) the court's conclusion that a rational jury could not have found the final three elements of the offense "without concomitantly finding that the investigation was pending in the first place." Pet. App. 87a. But the jury was instructed that it could convict only "if all jurors agree beyond a reasonable doubt that North took an act to

2. Despite occasional broad language in the decisions, North is incorrect in asserting (Cross-Pet. 10-11) that the courts of appeals are in conflict on the application of harmless error analysis to cases such as this one. It is true that the single post-*Carella* decision cited by North (at Pet. 11), *United States* v. *Dunkel*, No. 89-1841, 1991 U.S. App. LEXIS 3599 (7th Cir. March 8, 1991) at *4, observed that "the error cannot be harmless" when a district judge fails to instruct the jury on "one of the elements of the offense." But the *Dunkel* court did not—and on the record before it, had no occasion to—address the question whether other findings by the jury (or concessions by the defendant at trial) might establish harmlessness.[9] Other post-*Carella* decisions

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obstruct *the same congressional inquiry* with the requisite specific and corrupt intent and knowledge of the pending inquiries." JA 636 (emphasis added). The jurors therefore must have had in mind a particular, existing congressional inquiry that was the subject of North's obstructive conduct. Indeed, as the same testimony—provided by North himself—established both the pendency of the inquiries and North's knowledge of that pendency (see Pet. App. 86a), it is hardly likely that a rational jury might have found the latter element without also finding the former. While elliptically acknowledging his concession at trial that a congressional inquiry was pending, North also contends that his testimony "concerned only his knowledge of the Iran inquiry" (Pet. 8 n.7); North argues that the jury might not have relied on that concession because "[t]he jury's verdict on Count 6 does not disclose whether it found that North aided and abetted an endeavor to obstruct an *Iran* inquiry, a *Contra support* inquiry, or both" (*ibid.* (emphasis in original)). As the court of appeals explained, however, the question whether the obstructive acts related to the subject matter of the inquiry "is one of 'pertinency,' not 'pendency,' and is therefore a question of law for the court rather than for the jury." Pet. App. 88a n.30. That conclusion plainly is correct (see *Kungys* v. *United States*, 485 U.S. 759, 772 (1988); *Sinclair* v. *United States*, 279 U.S. 263, 298 (1929)), and North does not take issue with it in his cross-petition.

[9] In *Dunkel*, a prosecution for failure to file an income tax return, the district court refused to instruct the jury that "mistaken interpretations of the tax laws * * * defeat the mental state necessary to the offense, no matter how unreasonable those beliefs may be." 1991 U.S. App. LEXIS 3599, at *2. No other findings by the jury

have made clear that failure to instruct on an element of the offense is subject to harmless error inquiry. See *Martinez* v. *Borg*, No. 89-56163, 1991 U.S. App. LEXIS 7314 (9th Cir. April 25, 1991), at *5; *Hennessy* v. *Goldsmith*, No. 89-16251, 1991 U.S. App. LEXIS 5032 (9th Cir. April 1, 1991), at *12. See also *Hill* v. *Maloney*, 927 F.2d 646 (1st Cir. 1990) (harmless error analysis applied to conclusive presumption); *United States* v. *Dotson*, 895 F.2d 263, 265 (6th Cir. 1990) (harmless error analysis applied to ambiguous instruction), cert. denied, 111 S. Ct. 94 (1990). As for the pre-*Carella* decisions cited by North, it is not at all clear that they remain good law;[10] in any event, like *Dunkel*, none of them considered whether a harmless error inquiry is appropriate when the omitted element is subsumed within other findings made by the jury.[11]

Given the recent decision in *Carella* and the pendency of *Yates* v. *Evatt*, in our view there is no need for the Court to revisit the issue presented here. Indeed, because

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shed light on whether the defendant held a mistaken but good faith belief that he did not have to file tax returns.

[10] Citing *Carella*, *Pope*, and *Rose*, the Sixth Circuit has observed that one of the decisions relied upon by North, *United States* v. *Mentz*, 840 F.2d 315 (6th Cir. 1988), "may not be long for this world." *Dotson*, 895 F.2d at 265. See *Hennessy*, LEXIS *11. It should be noted, however, that the court nevertheless indicated that, "whatever the Supreme Court might think of [it, *Mentz* remains] binding precedent" in the circuit. *Dotson*, 895 F.2d at 265. Similarly, the Seventh Circuit in *Dunkel* cited with approval another decision offered by North, *United States* v. *Kerley*, 838 F.2d 932 (7th Cir. 1988).

[11] See *Mentz*, 840 F.2d at 323-324; *United States* v. *Kerley*, 838 F.2d 932, 933-935, 938-939 (7th Cir. 1988); *United States* v. *White Horse*, 807 F.2d 1426, 1427-1429 (8th Cir. 1986); *United States* v. *Goetz*, 746 F.2d 705, 709 (11th Cir. 1984). The cases cited by North on this point (see Pet. 12 n.10) are inapposite; they simply do not, in terms, address the applicability of harmless error inquiry. See *United States* v. *Johnson*, 718 F.2d 1317, 1323 (5th Cir. 1983) (en banc); *United States* v. *Singleton*, 532 F.2d 199, 207 (2d Cir. 1976).

the court below applied the more restrictive of the harmless error tests argued by the parties in *Yates*, it seems most unlikely that anything in the pending *Yates* decision could bear on the outcome of this case. See *Yates*, No. 89-7691 Pet. Br. 18-19, 35-36; *id.*, Resp. Br. 19-24. Having said that, however, caution nevertheless suggests that it would be appropriate for the Court to hold North's cross-petition (assuming that the Court grants our petition) pending the decision in *Yates*; when this case is finally resolved, North's harmless error contention—which, it should be emphasized, affects only one of the counts on which he was convicted—may be reconsidered if anything in *Yates* calls into question the correctness of the court of appeals' decision.

B. Proof Of Knowledge Of Illegality Is Not Required Under 18 U.S.C. 1505

In another contention that concerns only Count 6, North asserts (Cross-Pet. 14-21) that the courts below did not require proof of the requisite mental state under Section 1505. While North refers (Cross-Pet. 14 & n.11, 19-20 n.15, 21 & n.18) to the district court's remarks on authorization, he appears to have abandoned the argument (rejected by the court below (see Pet. App. 56a-61a)) that he was entitled to an instruction on the defense of official authorization. Instead, his contention now reduces to the assertion that conviction under Section 1505 requires proof of the defendant's "*subjective* knowledge of illegality," so that "the district court should have instructed the jury that Count 6 required proof that North knew his conduct was unlawful." Cross-Pet. 21 (emphasis in original). This contention is wholly without merit.

North grounds his argument on what he terms (Cross-Pet. 15) the "fundamental principle" that "specific intent for serious federal offenses that embrace some apparently innocent conduct requires proof of subjective knowledge of wrongfulness or illegality," which he draws from two of this Court's decisions, *Cheek* v. *United States*, 111 S. Ct. 604 (1991), and *Liparota* v. *United States*, 471 U.S.

419 (1985). But those decisions, both of which involve the application of particular statutory language, stand for no such principle. The holding in *Cheek*—a prosecution under 26 U.S.C. 7201 and 7203 for willful evasion of taxes—"turn[ed] on the meaning of the word 'willfully' as used in §§ 7201 and 7203." 111 S. Ct. at 606. Recognizing "[t]he general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution" (*id.* at 609), the Court reversed the convictions only because it has "interpreted the statutory term 'willfully' as used in the federal criminal tax statutes as carving out an exception to the traditional rule. This special treatment of criminal tax offenses is largely due to the complexity of the tax laws." *Ibid.* See *id.* at 610-611. Similarly, *Liparota* involved an interpretation of 7 U.S.C. 2024(b)(1), which subjects to punishment "whoever knowingly uses" food stamps "in any manner not authorized by [the statute] or the regulations" (see 471 U.S. at 420); the Court held that the term "knowingly" conditions the "in any manner" language, explaining that the statute otherwise would have no mens rea requirement. *Id.* at 424-426.[12]

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[12] The decisions of the courts of appeals cited by North (Cross-Pet. 16 n.12) are similarly off the point. In *United States* v. *Rhone*, 864 F.2d 832 (D.C. Cir. 1989)—which is, in any event, another decision of the District of Columbia Circuit—the court held only that knowledge of illegality is necessary to establish "specific intent to defraud the government" under 18 U.S.C. 1341 and 1342, and D.C. Code 22-3811, -3812(a), and -3812(b). Whether or not this holding is correct, it is tied to the particular fraud offenses at issue; in reaching its conclusion, the court noted that its holding was an "exception" to the rule that "ignorance of the law is generally not a defense." 864 F.2d at 835. *United States* v. *Golitschek*, 808 F.2d 195 (2d Cir. 1986), was a prosecution under 18 U.S.C. 371 and 1343 for evading export restriction regulations. The court held that the charged offenses required proof of "knowledge of a legal requirement" (808 F.2d at 202)—that is, the regulations—but did not obligate the government to establish that the defendant was aware that his activities were subject to prosecution.

These holdings simply have no application here. The term "willfully" does not appear in Section 1505, and the statute's language does not parallel that of 7 U.S.C. 2024 (b)(1). Instead, Section 1505 reaches persons who "corruptly" commit specified obstructive acts. And so far as we are aware, no court ever has interpreted use of the word "corruptly" in any statute to require proof of knowledge of illegality.[13] That is so, in particular, of the

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[13] The cases cited by North certainly stand for no such proposition. *United States* v. *Reeves*, 752 F.2d 995 (5th Cir.), cert. denied, 474 U.S. 834 (1985) (cited at Cross-Pet. 17, 20), involved a prosecution under 26 U.S.C. 7212(a), which imposes penalties upon one who "corruptly * * * endeavors to intimidate or impede any officer or employee of the United States acting in an official capacity under this title." The court nowhere suggested that knowledge of unlawfulness was requisite for conviction; to the contrary, the court said it would be enough if the defendant "meant to impede or intimidate officers or agents of the Internal Revenue Service from collecting his just debt of taxes due or from scrutinizing his tax accounts." 752 F.2d at 1002. (The court also reasoned that the term "corruptly" should be given a less expansive reading under Section 1503 than under Section 7212(a) "because [Section 1503] covers only actions related to pending judicial proceedings, thus providing adequate notice to potential violators" (*id.* at 799); in this regard, Section 1505, which reaches only actions related to pending congressional inquiries, stands on the same footing as Section 1503). Similarly, *United States* v. *McElroy*, 910 F.2d 1016 (2d Cir. 1990) (cited at Cross-Pet. 19 n.14), defined the term "corruptly" in 18 U.S.C. 215(a) as referring "'to acts done voluntarily and intentionally with the bad purpose of accomplishing either an unlawful end or result, or a lawful end or result by some unlawful means.'" 910 F.2d at 1021, quoting *United States* v. *Brunson*, 882 F.2d 151, 154 n.2 (5th Cir. 1989). This definition, of course, requires a purpose to do an act that is illegal, not a purpose to violate the law. Indeed, *Brunson*, the decision from which the *McElroy* court drew its definition, expressly rejected the contention that the "word 'corruptly' * * * reflects an intent to require a high degree of intent of an offender. [The defendant] offers no authority in support of his argument and we have found none.'" 882 F.2d at 154. It may be added that the instruction on specific intent given below is virtually

many courts that have interpreted Section 1505 and its companion obstruction of justice provision, 18 U.S.C. 1503.[14] Any danger that the statute might be applied to reach "apparently innocent conduct" (Cross-Pet. 18) is, as the court below suggested, obviated by the jury's application of the word "'corruptly' * * * according to [its] common meaning[]" (Pet. App. 68a)—a meaning that reaches, among other things, conduct that is "'of debased political morality'" and characterized by "'improper political or legal transactions or arrangements,'" or is "'inconsistent with official duty and the rights of others.'" *Id.* at 63a (citations omitted).

It hardly need be added that this is not, in fact, a case involving "apparently innocent conduct." As the jury found—indeed, as North essentially conceded at trial (see Pet. App. 86a)—the defendant created a false chronology to be used in briefing Congress, and "altered, destroyed, and concealed official documents in this same time frame." *Ibid.* That use of deceit or misdirection to thwart a con-

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identical to the language from *McElroy* that North cites with approval. See JA 672-673 ("Specific intent requires that a person not only acted knowingly, voluntarily, and deliberately, but that he acted with a bad purpose, having decided in his mind what he would do, and that he then did something prohibited").

[14] See *e.g.*, *United States* v. *Mitchell*, 877 F.2d 294, 299 (4th Cir. 1989) (act with intent to obstruct inquiry violates Section 1505); *United States* v. *Laurins*, 857 F.2d 529, 536-537 (9th Cir. 1988), cert. denied, 109 S. Ct. 3215 (1989) (act with intent to obstruct violates Sections 1503 and 1505); *United States* v. *Jeter*, 775 F.2d 670, 679 (6th Cir. 1985), cert. denied, 475 U.S. 1142 (1986) (specific intent to obstruct violates Section 1503); *United States* v. *Rasheed*, 663 F.2d 843, 852 (9th Cir. 1981), cert. denied, 454 U.S. 1157 (1982) (purpose to obstruct justice is violation of Section 1503). The Section 1503 decision cited by North (at Cross-Pet. 20 n.16), *United States* v. *Thomas*, 916 F.2d 647, 651 (11th Cir. 1990), is consistent with this authority; the "corrupt motive" referred to in that case may be established by "show[ing] that the defendant knowingly undertook an action from which an obstruction of justice was a foreseeable result." *Ibid.*

gressional inquiry surely was "of debased political morality" and was "inconsistent with official duty," and therefore was "corrupt[]" within the meaning of Section 1505.[15]

C. The Discovery Provided North More Than Satisfied The Requirements Of Due Process

1. North's final contention (Cross-Pet. 22-30) challenges the district court's failure to order the disclosure of rebuttal evidence under CIPA. Relying on *Wardius* v. *Oregon*, 412 U.S. 470 (1973), North insists that, whenever a defendant is obligated to provide material to the government in discovery, the Constitution requires the government to disclose the evidence that it will use to rebut the defendant's disclosures. North accordingly concludes that the district court's failure to order the disclosure of rebuttal evidence after he made his CIPA submission was constitutional error that the government was obligated to prove harmless beyond a reasonable doubt.

This contention, which rests on a patent misreading of *Wardius*, is without substance. *Wardius* did not hold that the Constitution requires the government to supply and identify *rebuttal* evidence. Instead, the Court recognized a rule, grounded on the Due Process Clause, that "discovery must be a two-way street. The State may not insist that trials be run as a 'search for the truth' so far as defense witnesses are concerned, while maintaining 'poker game' secrecy for its own witnesses." 412 U.S. at 475 (footnote omitted). The rule of *Wardius* thus requires the government to offer discovery of the same quantum and nature as that required of the de-

[15] In these circumstances, as the court of appeals explained, "because knowledge of illegality was not required, [North] was not entitled to an instruction that the jury should consider authorization as bearing on knowledge of illegality." Pet. App. 67a. The district court's instruction thus was overly generous to North; "the trial court might well have omitted any reference to authorization." *Id.* at 65a.

fense, so as to maintain "the balance of forces between the accused and his accuser." *Id.* at 474.

The Seventh Circuit therefore has explained, in a decision cited with approval by North (Cross-Pet. 22), that "reciprocity dictate[s] only that the defense be entitled to the same scope of discovery to which the prosecution was entitled, nothing less and nothing more." *Mauricio* v. *Duckworth*, 840 F.2d 454, 459 (7th Cir.), cert. denied, 488 U.S. 869 (1988). See *id.* at 459 n.7. As a consequence, the courts uniformly have held that, so long as the government offers sufficient discovery to prevent undue surprise, violations of Fed. R. Crim. P. 12.1(b)—which requires the government to disclose the information it will use to rebut evidence of an alibi provided by the defendant in discovery—must be assessed under a nonconstitutional harmless error standard. See, *e.g.*, *United States* v. *Vela*, 673 F.2d 86, 89 (5th Cir. 1982); *United States* v. *Portillo*, 633 F.2d 1313, 1324 (9th Cir. 1980), cert. denied, 450 U.S. 1043 (1981); *McClendon* v. *United States*, 587 F.2d 384, 388 (8th Cir. 1978), cert. denied, 440 U.S. 983 (1979); *United States* v. *Floyd*, 555 F.2d 45, 48 n.7 (2d Cir.), cert. denied, 434 U.S. 851 (1977).[16]

The government's disclosures here, viewed against those provided by North, more than met the *Wardius* reciprocity standard. The narrative discovery offered by North, which addressed classified information to be introduced through testimony, was something less than enlightening. It "weaves together classified information relating to

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[16] The language from *Wardius* that is cited by North (Cross-Pet. 26)—that it is unfair to subject a defendant "to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the State" (412 U.S. at 476)—is taken dramatically out of context. In *Wardius*, which concerned a notice-of-alibi rule, the state had provided no discovery at all. See *id.* at 475. And as the outcome in such a case turns entirely on the validity of the alibi, the only meaningful discovery for the government to offer is that bearing on the defendant's alibi evidence.

hundreds of topics or incidents, often in a rather disjointed fashion," and does "not tie this classified information to particular counts" (*North II*, 713 F. Supp. at 1437). As for the classified documents designated by the defense, North's counsel "remained, in spite of the [district] Court's urging, unwilling to advise the government, except occasionally in the most generalized terms, why they believe that a particular document or portion of a document is relevant, material and required in defending the case." *Id.* at 1438.

In addition, while North's narrative offered what the district judge regarded as some useful information (see Cross-Pet. App. 15a), it "does not indicate which individuals mentioned will be called as witnesses, nor does it develop in any detail how most of the facts mentioned will be proved." *Ibid.* It also "does not tie the information to any particular count in which North is charged or undertake to support statements by documentation." *Ibid.* And it "is by its very nature only partially revealing because it makes no reference * * * to related nonclassified proof." *Id.* at 16a. Indeed, "[a]fter examining the classified documentary and testimonial material," the district court declared that both it and the government were "in most cases * * * unable to determine why North believes a particular document is relevant and material to the remaining counts." *North II*, 713 F. Supp. at 1437-1438.

In contrast, the government provided North some 900,000 pages of documents in discovery, identifying both the classified documents and the witnesses it would use against him. Cross-Pet. App. 17a. It "filed several memoranda narrowing the issues in the case and explicating some aspects of its theory of the case." *Ibid.* And "over several days of CIPA § 6 hearings, at which defense counsel were present, the Independent Counsel explained the significance to its theory of the case of many of the classified documents in its case-in-chief, and Independent Counsel

responded frankly to the Court's numerous inquiries about its case." *Ibid.* In these circumstances, the district court provided North's CIPA submission to the government precisely because it could not "accede to North's view of due process that one is entitled to get everything and to disclose nothing. Due Process is an even-handed concept * * *." That determination—and the court of appeals' parallel conclusion (see Pet. App. 103a-105a)—is fully consistent with *Wardius*.

In fact, while it might have been better for the district court to have addressed North's Section 6(f) motion explicitly, the court would have acted well within its discretion in denying the motion. As the district court observed, given the disjointed nature of North's submission, "[t]he government * * * indicated both orally and in writing its inability to relate the documentary materials to its understanding of the issues in the case" (*North II*, 713 F. Supp. at 1438)—an inability that the district court shared. See *id.* at 1437-1438. With North's submission in such a state, it is difficult to imagine how the government could have offered particularized rebuttal evidence. The district judge thus found it "abundantly clear" that his application of CIPA did not deny North a fair trial. JA 512.

2. North's claim (Pet. 27-30) that the court of appeals' decision is in conflict with the harmless error rule of *Kotteakos* v. *United States*, 328 U.S. 750 (1946), is similarly insubstantial. In fact, is is "well settled that '[a]n error in administering the discovery rules is not reversible unless shown to be prejudicial to the substantial rights of the defendant.'" *McClendon*, 587 F.2d at 388, quoting *United States* v. *Krohn*, 558 F.2d 390, 394 (8th Cir.), cert. denied, 434 U.S. 868 (1977). See, *e.g.*, *Vela*, 673 F.2d at 89; *Portillo*, 633 F.2d at 1324. Cf. *United States* v. *Miller*, 471 U.S. 130, 134 (1985) (reversal of conviction not appropriate because "there can be no showing" of prejudicial surprise). Here, of course, no such showing was made. See Pet. App. 103a, 105a.

And given the extraordinary disclosure obligations placed on the government, there plainly was no basis for a reviewing court to "conclude[] that [the] error may have had 'substantial influence' on the outcome of the proceeding." *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 256 (1988), quoting *Kotteakos*, 328 U.S. at 765. See *United States* v. *Lane*, 474 U.S. 438, 449 (1986) (no reversal unless error "results in actual prejudice").

North also suggests that the courts of appeals are in conflict on which party bears the burden of proof in a harmless error inquiry. He acknowledges, however (Cross-Pet. 27), that the defendant must establish prejudice when the error did not affect his substantial rights. And that plainly is the case here. While "the District Judge did not move straightforwardly down the procedural path set out in section 6 [of CIPA]" (Pet. App. 101a-102a), he accorded the defense an enormous amount of discovery from the government; his only error lay in failing expressly to deny North's motion for "rebuttal" discovery under Section 6(f). In substance, then, North got everything (if not more) than he deserved. It is particularly appropriate in a case such as this one to place the burden of going forward with evidence of prejudice on the defense; North is far better situated than is the government to identify particular pieces of prosecution evidence that caused him prejudicial surprise. He has, of course, failed to point to any such evidence.

CONCLUSION

If the petition for a writ of certiorari in No. 90-1337 is granted, the cross-petition should be held for disposition as appropriate in light of *Yates* v. *Evatt*, No. 89-7691.

Respectfully submitted.

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